



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Federal Data Corporation

File: B-236265.4

Date: May 29, 1990

David S. Cohen, Esq., Cohen & White, for the protester.
Ardelle C. St. George, Esq., for General Dynamics Corporation, an interested party.
Carl J. Peckinpugh, Esq., Office of the General Counsel, Department of the Air Force, for the agency.
Paul Lieberman, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably provided offerors whose best and final offers (BAFO) had been found technically acceptable an opportunity to submit new BAFOs in response to the General Accounting Office's (GAO) remedial recommendation to reopen discussions and obtain another round of BAFOs under a protest sustained because the agency conducted improper post-award discussions with the awardee only. The agency was not required to conduct additional detailed discussions with offerors whose proposals were technically acceptable in order to comply with GAO's recommendation, which did not require that the agency entirely reconduct the procurement.

2. Requests for reconsideration which merely disagree with the General Accounting Office's initial decision without showing that the decision was based on error of fact or law do not provide any basis for modification or reversal.

DECISION

Federal Data Corporation protests that the Air Force failed to conduct meaningful discussions before calling for new best and final offers (BAFO) in response to our Office's recommendation for corrective action in Federal Data Corp., B-236265.2, Jan. 25, 1990, 90-1 CPD ¶ 104. The procurement at issue is an indefinite quantity, indefinite duration contract, estimated to cover a 10-year period, which was awarded to General Dynamics Corporation under request for

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proposals (RFP) No. F19630-89-R-0001, issued by the Air Force Computer Acquisition Center for computer hardware, software, maintenance, training, and data to support the Strategic Air Command Strategic War Planning Systems (SWPS). The computer equipment in question consists primarily of off-the-shelf items.

We deny the protest.

In our earlier decision, we found that the Air Force improperly conducted post-award discussions with General Dynamics concerning a proposed substitution for a mass storage subsystem which was noncompliant with the technical requirements under the RFP, a problem which was first brought to the Air Force's attention after award had been made. As a result of General Dynamics' misinterpretation of a subcontractor's technical literature, General Dynamics had proposed a mass storage subsystem which was based on a miscalculation of the actual capacity of the system's optical storage disks, with the result that the proposal offered only half the equipment necessary to meet the RFP specifications for automatically accessible storage.

General Dynamics had discovered this error prior to submitting its BAFO, but did not notify the Air Force of it or revise its proposal because General Dynamics believed that a technical and communication "freeze," preventing further revisions, had been imposed by the Air Force in its request for BAFOs. The request stated that if an offeror's BAFO contained inadequately explained changes from its original proposal, such changes might affect the adequacy of the proposal and could render it unacceptable, and that any technical revision would not be subject to further discussions. Based on its evaluation of BAFOs, the Air Force determined that the proposals submitted by General Dynamics and Federal Data were technically acceptable, as was a third proposal submitted by Science Applications International Corporation (SAIC).

After determining that the General Dynamics and Federal Data proposals were essentially equal technically, the Air Force awarded the contract to General Dynamics at a current dollar value of \$165,553,887. Federal Data's second low offer was \$574,201,366 in current dollar value. Federal Data then filed a protest with our Office alleging that General Dynamics was attempting to "buy in" with a below-cost offer. During the development of that protest, General Dynamics notified the Air Force that it was unable to furnish the storage subsystem line items because of the error the firm had made regarding the subsystem's capacity. General Dynamics proposed the substitution of a different

subsystem which affected approximately 15 of the contract line items constituting approximately 1.7 percent of the total cost under General Dynamics' BAFO. The proposed change was at no additional cost to the Air Force since the RFP required compliance with the technical specifications irrespective of the equipment actually proposed.

Thereupon, Federal Data withdrew its original protest and filed the protest which we eventually sustained, alleging that the Air Force's acceptance of General Dynamics' noncompliant proposal and the conduct of corrective post-award discussions were improper. We sustained the protest because we determined that when the Air Force conducted post-award discussions with General Dynamics for the purpose of making its proposal acceptable, the Air Force was required to reopen discussions with all offerors within the competitive range and afford them an opportunity to submit revised offers. 10 U.S.C. § 2305(b)(4) (1988); Motorola, Inc., B-225822, June 17, 1987, 87-1 CPD ¶ 604. As we noted in our initial decision, this rule applies even where discussions are reopened after an initial selection is made.

In its submissions under this earlier protest, Federal Data argued that it was prejudiced because additional discussions probably would have resulted in a price increase for General Dynamics and a price decrease for Federal Data. We did not address that allegation because we found that the requirement for discussions obtains even where the post-selection negotiations do not directly affect the offeror's relative standing, because of the requirement that all offerors be afforded equal treatment and an opportunity to revise their proposals. Federal Data Corp., B-236265.4, supra; PRC Information Sciences Co., 56 Comp. Gen. 768 (1977), 77-2 CPD ¶ 11.

At issue now is the scope of our corrective action recommendation that the Air Force "reopen discussions with all offerors in the competitive range and obtain another round of BAFOs." We did not recommend termination of the General Dynamics contract, under which performance has now been continuing for almost a full year. Prior to the issuance of our recommendation, as a result of the discussions which it had conducted with General Dynamics, the Air Force had approved General Dynamics' proposed no-cost modification which substituted a compliant mass storage subsystem and other associated line items. This modification was executed on March 9, 1990, and also included certain concessions to the government in the form of increased warranties and other minor additional no-cost enhancements to compensate the government for delivery delays associated with curing the noncompliant subsystem.

In response to our recommendation, the Air Force revalidated its needs and, on March 6, 1990, advised General Dynamics that another round of BAFOs was due March 23. The letter advised General Dynamics that its existing contract as modified constituted its second BAFO, and that the other offerors had been so notified. The letter also advised General Dynamics that the Air Force would accept only price changes in General Dynamics' BAFO which would decrease its life cycle costs. By letters dated March 9, the Air Force requested SAIC and Federal Data to submit new BAFOs by March 23. Both of these letters advised that "your proposal is still considered to meet all of the requirements of the RFP and remains acceptable and eligible for award; there is no need for further negotiations." Both offerors were asked to submit BAFOs based on execution and submission of the model contracts which they had submitted as their previous BAFOs. The requirement was reduced to the remaining 9 years of the contract life. All three BAFO requests contained essentially the same language quoted above requiring that all technical changes be justified--otherwise the offerors risked being found technically unacceptable--and indicating that no additional discussions would be provided.

SAIC requested a 30-day extension of the closing date and Federal Data requested additional discussions and a 90-day extension. In response, the Air Force extended the closing date to April 6. On March 22, Federal Data filed an agency-level protest and on April 5, immediately before submitting its second BAFO, Federal Data filed this protest with our Office. On the same date, Federal Data filed a request for injunctive relief with the United States Claims Court. That request was denied by the court, which simultaneously asked our Office to issue a final decision to the parties by May 28, 1990.

The crux of Federal Data's protest is that the Air Force did not provide meaningful discussions because the offerors were not provided the "equal" treatment in the conduct of discussions that Federal Data believes was required under our recommendation. More particularly, Federal Data asserts that it was entitled to sufficient discussions to safely permit it to change the configuration offered in its new BAFO without running the risk of having its BAFO found technically noncompliant as a result of such changes. Federal Data asserts that the Air Force should have conducted similar discussions with: "all offerors limited to the areas in which each offeror can improve its technical score. Each offeror would be permitted to make changes in those areas of its proposal, and resolve any clarification requests or deficiency reports identified by the Air Force."

Federal Data estimates that "this process could reasonably be completed in 120-180 days."

Federal Data argues that in the absence of such discussions, it is not being treated "equally" with General Dynamics, with which extensive discussions were conducted and as a result of which General Dynamics did not risk having its revised BAFO rejected as technically unacceptable. In this respect, Federal Data contends that because of recent technological advances, had such discussions been conducted it could have reconfigured its technical proposal, significantly improving its technical score and reducing its price to "less than \$300 million" in current dollars, thereby significantly improving its competitive standing.

FAR § 15.610(b) requires that written or oral discussions be held with all offerors under a negotiated procurement who submit proposals in the competitive range. The fundamental purpose of this requirement is to have offerors advised of deficiencies in their proposals and afforded the opportunity to satisfy the government's requirements through the submission of revised proposals. FAR § 15.610(c)(2). Detailed discussions need only be conducted with offerors whose proposals contain technical uncertainties. Where the contracting officer does not identify any technical deficiencies in a proposal, discussions properly may be limited to an opportunity to submit revised proposals. American KAL Enters., B-232677.3, Feb. 3, 1989, 89-1 CPD ¶ 112. Further, an agency properly may conduct extensive discussions with offerors whose proposals contain technical deficiencies without providing such discussions to offerors whose proposals do not contain such deficiencies. Gracon Corp., B-236603, Dec. 26, 1989, 89-2 CPD ¶ 592; Neurodiagnostics of Mobile, Inc., B-223862, Dec. 1, 1986; Weinschel Eng'g Co., 64 Comp. Gen 524 (1985), 85-1 CPD ¶ 574.

Therefore, there is no requirement for "equal" discussions of the kind to which Federal Data argues it is entitled. Rather, an agency's decision not to engage in technical discussions with a firm such as Federal Data, whose proposal contains no technical uncertainties, is unobjectionable and under these circumstances the request for BAFOs itself constitutes appropriate discussions. Sperry Corp., 65 Comp. Gen. 195 (1986), 86-1 CPD ¶ 28; Metron Corp., B-227014, June 29, 1987, 87-1 CPD ¶ 642; Furuno U.S.A., Inc., B-221814, Apr. 24, 1986, 86-1 CPD ¶ 400.

Here, after the first round of BAFOs, Federal Data's proposal was technically acceptable while, as was not learned until after award, General Dynamics' proposal was not technically acceptable. Thus, it was appropriate for

the Air Force to conduct technical discussions with General Dynamics without conducting such discussions with Federal Data. See Neurodiagnostics of Mobile, Inc., B-223862, supra. Although Federal Data argues that it should have had the same new opportunity for proposal revision given to General Dynamics, once meaningful discussions have occurred, there is no requirement that an agency conduct discussions anew with an offeror who has submitted a technically acceptable proposal simply to allow the offeror to substitute a different technical approach. Id. The record here, of course, establishes that meaningful discussions were held.

Prior to calling for initial BAFOs, the Air Force had conducted exhaustive discussions with the offerors. As Federal Data points out, after receipt of initial proposals the Air Force informed each offeror of all perceived deviations and ambiguities through the issuance of clarification requests (CR) or deviation reports (DR) which required the offerors to establish that their proposals met the mandatory specifications. During this process, each proposal was validated against a mandatory requirements checklist of 2,130 technical items. Validation was successfully completed when all mandatory requirements under the solicitation were satisfied. Two source selection evaluation board (SSEB) members independently validated each requirement as a check and balance. Eighteen SSEB members were used over a 4 month period to complete this task using technical literature and their expertise to determine the feasibility, logic, and reasonableness of each offeror's claims. If a proposal was deficient or unclear with respect to any solicitation requirement, a CR or DR was issued and the offeror's response was subjected to a repeat of the validation process until all mandatory solicitation requirements were met.

In our view, the thoroughness and specificity of these discussions establishes that meaningful discussions were held, and that Federal Data had every reasonable opportunity to structure its proposal as it deemed appropriate to respond to the Air Force's concerns. Accordingly, the Air Force was not required to repeat the process under the reopened discussions for an offeror such as Federal Data, whose proposal was, in fact, already confirmed as technically acceptable. See Nelson Electric Marine Division, B-227906, Sept. 21, 1987, 87-2 CPD ¶ 286; ALM, Inc., B-225589 et al., May 7, 1987, 87-1 CPD ¶ 486; American Bank Note Co., B-222589, Sept. 18, 1986, 86-2 CPD ¶ 316.

Moreover, we point out that the Air Force did not prevent Federal Data from reconfiguring its technically acceptable

proposal in the manner which Federal Data asserts would have made it more competitive. Rather, Federal Data made the business judgment to submit the identical BAFO, at the same price which it had previously submitted, adjusted only to reflect the fact that 9 years remained under the contract rather than the 10 years under the initial RFP. Federal Data simply misconstrues our recommendation to reopen discussions as entitling it to discussions sufficient to provide a risk-free opportunity to substitute a new technical approach for an already technically acceptable proposal. Neither the requirement for meaningful discussions nor our recommendation to reopen discussions and obtain a new round of BAFOs imposes such an obligation.^{1/}

Federal Data has also argued that by calling for it to submit its BAFO after the date on which General Dynamics had submitted its technical BAFO, the Air Force violated the requirement under FAR § 15.611(c)(3) to establish a common cutoff date. The Air Force gave General Dynamics the same closing date as Federal Data for submitting its BAFO pricing. The purpose of a common cutoff date under negotiated procurements is to eliminate the danger of premature disclosure of information during the course of the competitive process. The B.F. Goodrich Co., 67 Comp. Gen. 414 (1988), 88-1 CPD ¶ 471. General Dynamics, not Federal Data, was the offeror in a position to be prejudiced by its earlier technical cutoff date, and there is no evidence that any improper disclosures resulted. Since Federal Data was not prejudiced by the lack of a common cutoff date, it has no basis for protest in this regard. Id.

Federal Data also asserts that certain of the SWPS requirements under the RFP are inaccurate because they will overlap requirements under other RFPs currently issued or contemplated by the Air Force. The Strategic Air Command, the primary user of the equipment, has determined that the RFPs cited by Federal Data do not, in fact, affect the scope of the SWPS requirement. Federal Data has not established that there is any material change in the scope of the SWPS requirement. Further, the SWPS RFP is for an indefinite

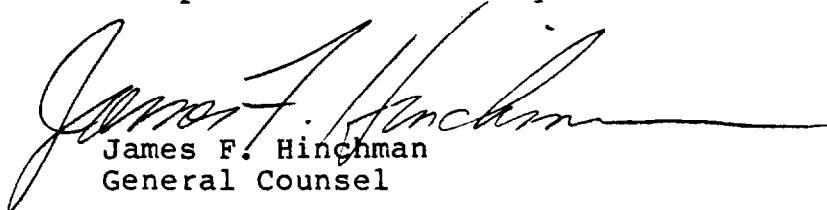
^{1/} Federal Data has framed the argument that it was entitled to a risk-free opportunity to substantially revise its technical proposal in several ways. For example, it asserts that the Air Force's discussions with General Dynamics concerning the mass storage subsystem substitution permitted General Dynamics to propose other technical enhancements beyond the scope of the necessary cure. These arguments represent variations of Federal Data's primary argument and need not be addressed individually.

quantity, indefinite duration contract with a \$2 million minimum order requirement, which is not a requirements contract. Thus, even if there were some possible overlap and certain of the requirements could be satisfied by the Air Force under other contracts, this would not establish that there was any impropriety in the SWPS RFP.

Federal Data has also complained that the 28 days allowed for the offerors to revise their BAFOs was insufficient. This argument is essentially a restatement of Federal Data's contention that it was entitled to discussions sufficient to permit it to reconfigure its already technically acceptable proposal, which we rejected above. Further, under the circumstances, we find that the 28 days provided by the Air Force was a sufficient time for the offerors to revise their BAFOs. See Control Data Corp., B-235737, Oct. 4, 1989, 89-2 CPD ¶ 304.

In its April 30, 1990, conference comments under this protest, the Air Force requested that we reconsider our earlier decision sustaining Federal Data's protest. The Air Force argues that Federal Data's failure to change its BAFO evidences that it actually suffered no prejudice as a result of the Air Force actions which caused us to sustain the prior protest. Federal Data has also, in effect, requested reconsideration of our earlier decision by its argument that it is entitled to a broader remedy than was granted. Under our Bid Protest Regulations, a reconsideration request must be filed within 10 days after the basis for reconsideration is known or should have been known. 4 C.F.R. § 21.12 (1989). Here, in fact, both requests merely reflect disagreement with our initial decision; thus, both requests were untimely because they were filed more than 10 days after the parties received copies of our earlier decision. LightningMaster Corp.--Request for Reconsideration; B-236233.3, Oct. 3, 1989, 89-2 CPD ¶ 291; Soltec Corp.--Reconsideration, B-234597.3, Aug. 21, 1989, 89-2 CPD ¶ 157. In any event, neither request provides any evidence of error of fact or law which warrants the modification or reversal of our prior decision; thus, neither provides any basis for reconsideration. 4 C.F.R. § 21.12; Junction City-Fort Riley-Manhattan Transp. Co., Inc.--Reconsideration, B-235886.2, Aug. 9, 1989, 89-2 CPD ¶ 121.

The protest and the requests for reconsideration are denied.


James F. Hinchman
General Counsel